Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-531

UNION CAMP CORPORATION,

Petitioner,

v.

SEABOARD COAST LINE RAILROAD COMPANY, RAY D. BROWN and NANCY JANE BROWN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

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v.

SEABOARD COAST LINE RAILROAD COMPANY,
RAY D. BROWN and NANCY JANE BROWN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on June 27, 1977.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix "A" hereto, *infra*, pp. 2a-18a, is reported in 554 F.2d 1299. The judgment of the Court of Appeals

was entered on June 27, 1977, and is printed in said Appendix "A", *infra,* p. 1a. Rehearing was denied on August 25, 1977. Notice of the order is printed in Appendix "B" hereto, *infra,* p. 19a

The jurisdiction of this Court is invoked under 28 U.S.C., §1245(1).

QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit departed from the mandate of *Erie R. Company v. Tompkins,* 304 U.S. 64 (1938), in creating a conflict with a *nisi prius* decision in that Circuit construing the identical contract (which decision is presently on appeal to the Court of Appeals of the State of Georgia), respecting indemnification for an indemnitee's own negligence, particularly where the negligence of the indemnitee exceeded that of the indemnitor.

STATEMENT

This suit, an action for damages by Plaintiff Ray Brown and for loss of consortium by his wife, was instituted in the State Court of Chatham County, Georgia, and removed to the United States District Court for the Southern District of Georgia on the grounds of diversity of citizenship under 28 U.S.C.A. §1332 and §1441 (R. 12). The complaint alleged that on August 28, 1972, while attempting to make a delivery at the premises of Petitioner, Union Camp Corporation (hereinafter referred to as "Union Camp"), in Savannah, Georgia, Plaintiff Ray Brown was involved in a collision with a switch engine the property of Respondent Sea-

board Coast Line Railroad Company ("Seaboard"). Generally, the Plaintiffs contended that the collision occurred as a consequence of Union Camp's construction of a building that obstructed the vision of motorists crossing the tracks and in Seaboard's negligent operation of the engine.

Seaboard cross-claimed against Union Camp alleging that if Defendant Seaboard was answerable in damages to the Plaintiffs, Union Camp was answerable over to Seaboard by way of full and complete indemnification under a contract between the two parties. (R. 11.) (Said contract appears in Appendix "C" hereto, *infra* pp. 20a-29a.) Union Camp answered and denied liability under the indemnity agreement.

On submission of the case on special interrogatories, the jury found the negligence that proximately caused the collision to be attributable 45% to the Plaintiff Ray Brown, 40% to Seaboard, and 15% to Union Camp. In view of the Georgia law on contributory negligence, the trial court entered judgment that the Plaintiff recover nothing of the Defendants and that the complaint be dismissed, inasmuch as the negligence of the Plaintiff exceeded the negligence of either Defendant. (R. 121.)

On August 6, 1975, the court found in favor of Defendant Seaboard and against Union Camp on the indemnity agreement for attorney's fees and expenses (R. 138), and on August 14, 1975, judgment was entered thereon. (R. 144(a).)

On September 5, 1975, the court overruled Union Camp's motion for judgment notwithstanding the verdict (R.[1]); on September 10, 1975, it overruled Union Camp's motion for reconsideration of the order of August 6,

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[1] Unnumbered document in Second Supplemental Record of Appeal.

1975 (R. 169-173); and on October 8, 1975, it overruled the Plaintiff's motion for new trial (R. 174). Union Camp, on October 17, 1975, filed a notice of appeal from the opinion order and also from the order overruling its motion for judgment n.o.v. and motion for reconsideration. (R. 175.)

The United States Court of Appeals, Fifth Circuit, sustained the trial court's decision on June 27, 1977, and denied Union Camp's petition for rehearing on August 25, 1977.

REASONS FOR GRANT OF WRIT

This Application concerns the upholding by the Fifth Circuit of the lower court's determination that a contract which, by its terms, does not indemnify against indemnitee negligence, nevertheless entitles an indemnitee adjudicated as 40% negligent (though not liable to the plaintiff) to recover 100% of its attorney's fees and litigation costs.

The decision of the court below is here challenged on the following grounds:

1. Because the Fifth Circuit's sustaining of the award of fees and costs under the indemnity agreement involved is in direct conflict with a decision construing the same indemnity contract; which latter decision is now under review in the Georgia Court of Appeals. A decision by the Court of Appeals on the same issue and identical contract is expected soon and, if an affirmance, will definitively render the Fifth Circuit decision in the instant case a departure from the rule of *Erie R. Co. v. Tompkins, supra.*[2]

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[2] Petitioner appreciates the unusual nature of its request that this Honorable Court consider the *Erie* principle in context of a conflict with a case currently pending before the State appellate

[footnote continued]

2. Because the interpretation of this indemnity agreement to absolve the indemnitee from its own negligence is contrary to established law in Georgia, which prohibits such construction unless that intent is unequivocally expressed in the agreement. The failure to follow State law requiring the indemnity to be construed strictly against the indemnitee departs from the *Erie* rule.

3. Because the Fifth Circuit's affirmance was erroneously premised on an inapposite State authority, *L. & N.R. Co. v. Atlantic Co.*, 66 Ga. App. 791, 19 S.E.2d 364 (1942), which is clearly distinguishable on its face.

4. Because the Fifth Circuit's affirmance is contrary to established Georgia law that prohibits an indemnitee from recovering from an indemnitor where, as here, the indemnitee has been adjudged not liable to the plaintiff. The Fifth Circuit has hereby departed from the *Erie* rule.

5. Because the Fifth Circuit's affirmance of an award of 100% of fees and costs against a party (Petitioner) finally adjudged as only 15% negligent, in favor of a party (Respondent Seaboard) finally adjudged as 40% negligent, does not apportion liability on the basis of fault.

6. Because the Fifth Circuit's affirmance fails to interpret the indemnities of paragraphs 5 and 12 in light of the entire contract as required by law.

Proper construction of this contract is a matter of importance to the parties at issue, as well as to litigants

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court. However, in view of the far-reaching consequences of this decision to other litigants, the prolonged period for which the instant agreement remains executory, and the proximity in time to a decision by the Georgia Court of Appeals on the identical subject matter, the Petitioner urges the Court to take into consideration the pendency of the State appellate court decision before passing on the merits of this Application.

in Georgia and other States. Insofar as the instant parties are concerned, the indemnity agreement may be expected to run well into the 21st Century. A faulty precedent in its interpretation could impose long-term and onerous financial burdens on the Petitioner (the indemnitor) that were not contemplated in the entering into the contract.

Parties to indemnity agreements throughout Georgia and other States will find themselves in a comparable status of uncertainty as to their contingent liabilities. Parties may be presumed to contract in the framework of existing law, which throughout the United States has uniformly left the indemnitee with the consequences of its own negligence unless the agreement plainly stipulates to the contrary. Under this Fifth Circuit decision, untold liabilities may accrue to innocent indemnitors who will unwittingly become saddled with damages and consequential expenses flowing from the negligence of their indemnitees. The traditional requirement that this result can be reached only if clearly required by the terms of the contractual agreement between the parties is reasonable; the Fifth Circuit's writing of that unwritten term into a contract is not. The case does not follow the *Erie* rule and bodes to impair contractual rights in Georgia and elsewhere.

The Fifth Circuit's opinion similarly ignores established State law on comparative negligence, in that it requires a party minimally negligent to be responsible for all expenses of the more negligent party. In doing so, it also requires indemnification for expenses of an action in which the indemnitee, though negligent, was adjudged not liable to the complainant in any sum whatever. Such a result also abandons the *Erie* rule and will cast parties litigant into an area of uncertainty as to their respective contractual rights.

In support of this Application and in elaboration of the grounds therefor Petitioner contends:

1. INTERPRETING THIS CONTRACT TO INDEMNIFY AGAINST THE INDEMNITEE'S NEGLIGENCE CONFLICTS WITH A STATE DECISION SPECIFICALLY INTERPRETING THE SAME INSTRUMENT.

On June 21, 1977, the Superior Court of Chatham County, Georgia rendered an opinion concerning the very indemnity agreement that is the subject of this suit. (A copy of said opinion, *George C. Sammons v. Union Camp Corporation, et al.*, Civil Action No. 9894, is hereto attached as Appendix "D," *infra* pp. 30a-34a.) *Sammons* holds that Paragraph 5 of said indemnity agreement does not protect the railroad against its own negligence. This is contrary to the opinion of the Fifth Circuit in the instant case.

Under *Erie R. Co. v. Tompkins, supra,* a federal court in a diversity case may not disregard State law in matters of substantive rights. While federal courts are not bound to follow a *nisi prius* decision involving State law, it is respectfully urged that certiorari be granted or at least stayed in the case at bar pending a decision on *Sammons* by a Georgia appellate court; *Sammons* being presently on appeal to the Georgia Court of Appeals (Case No.____).

2. SAID INTERPRETATION CONFLICTS WITH THE ENTIRE BODY OF GEORGIA DECISIONAL LAW.

The Fifth Circuit, in its affirmance of the decision of the trial court, has failed to apply the law of Georgia, though cited in its opinion, that indemnity contracts will hold indemnitees harmless against their own negligence only when the intent to do so is expressed in plain, clear, and unequivocal terms. None of the indemnities in the instant case makes mention, explicitly or by

necessary implication, of the indemnitee's negligence. Absence of such specificity has resulted in the construction of indemnity contracts strictly against the indemnitees in cases cited to and not distinguished by the Fifth Circuit: *Seaboard Coast Line Railroad Co. v. Freight Delivery Service,* 133 Ga. App. 92, 210 S.E.2d 42 (1974); *Benson Pail Co. v. Williams Const. Co.,* 128 Ga. App. 47, 195 S.E.2d 671 (1973); *Scarboro Enterprises v. Hirsh,* 119 Ga. App. 866, 169 S.E.2d 182 (1969); *Ragland v. Rooker,* 124 Ga. App. 361, 183 S.E.2d 579 (1971); *Bohannon v. Southern Railway Co.,* 97 Ga. App. 849, 104 S.E.2d 603 (1958); *Green v. Shepherd Construction Co.,* 46 F.R.D. 434 (N.D.Ga. 1969); *Massee & Felton Lumber Co. v. Ga. & Fla. Ry.,* 143 Ga. 173, 188 S.E. 57 (1915); *Hill v. Carolina Freight Carriers Corp.,* 235 N.C. 705, 71 S.E.2d 133 (1952) (decided under Georgia law).

(These Georgia cases simply follow the universal rule of construction of indemnity contracts, as stated in 41 Am. Jur.2d, "Indemnity" §15, and 42 C.J.S., "Indemnity" §12.)

It is a settled principle that indemnity contracts must be construed strictly against the indemnitee and in favor of the indemnitor. *Martin v. American Optical Co.,* 184 F.2d 528 (5th Cir. 1950). Moreover, where an indemnity is not contracted for as the principal purpose of the contract from a company in the business of furnishing indemnities for a premium, but is given by a party not in the indemnity business and as an incident of a contract with a different main purpose, the indemnity provision must be construed strictly in favor of the indemnitor. *Martin v. American Optical Co., supra.*

3. SAID INTERPRETATION MISCONSTRUES THE AUTHORITY IT RELIES ON.

Despite the crushing weight of authority to the contrary, the Fifth Circuit has chosen to follow the one case, *L. & N. R. Co. v. Atlantic Co., supra,* that lends any support to Respondent's position. The *L. & N. R. Co.* case is not only contrary to the great weight of authority, both in Georgia and throughout the United States, but is distinguishable from the instant case, as herein shown.

A. On the basis of the words "use . . . of the tracks" in the instant indemnity agreement, the Fifth Circuit, at 1302-03, analogized *L. & N. R. Co.* to find "a compelling indication" that the parties must have intended to indemnify for the railroad's negligence.

However, the *L. & N. R. Co.* indemnity went significantly beyond one for use of tracks only. It adds a second all-important phrase that is wholly absent from this case: "or the operation of locomotives or cars thereover . . ." The crux of the *L. & N. R. Co.* decision is clearly not the phrase common to both these cases (maintenance or use of the tracks); rather, it rests exclusively on the phrase absent from this agreement (the specific operation of locomotives and cars). As stated by that court, at 800:

> The contract contemplates only the operation, on defendant's spur track, of locomotives or cars by the plaintiffs, and, consequently, the negligence to be indemnified against was that of such railroad companies. If they were not to be indemnified for their negligence, it was an idle ceremony in using the words "or the operation of locomotives or cars thereover" in addition to the words (which injuries grow out of) "either the construction or the maintenance of said new track."

The significance of this distinction cannot be overstated. Anyone can "use" railroad tracks – the railroads, the owner, repairmen, pedestrians, bicyclists, automobiles at crossings, etc. But, as recognized by *L. & N. R. Co.*, only those train companies involved can operate locomotives and cars thereon during the term of the agreement. The wording of the second phrase as stressed by the *L. & N. R. Co.* court distinguishes that indemnity from this paragraph 12 indemnity in the same manner that this paragraph 5, also discussed by the Fifth Circuit, is distinguished by containing no language comparable to either of the two phrases discussed.

B. The Fifth Circuit opinion is premised on the parallel that if the "operation of locomotives or cars" language in *L. & N. R. Co.* necessarily referred to the railroad's operation on the tracks, then the "use . . . of the tracks" language in this case must also refer to the railroad's use. To reach that result in this case could involve a grammatical impossibility. Pruning paragraph 12 to its essential structure, it literally states as follows:

> In the construction, operation, use, repair, alteration or maintenance of the tracks . . . Union Camp hereby assumes all risk of . . . damage . . . or injury . . . caused . . . by the acts, defaults, or negligence of Union Camp . . . or by defects in trackage owned and maintained by Union Camp.

The phrase in question, covering the use of tracks, occupies a position in an introductory participial phrase connected to the subject of the sentence, Union Camp. The indemnity does *not* say that in the construction, etc. of the tracks the *railroad* shall be indemnified. The only literate reading is that in *Union Camp's* construction, etc. of the tracks, it assumes the risk of damage or injury caused by its acts or negligence or by trackage defects. A contrary reading dangles the introductory phrase indefinitely and impermissibly construes the contract against the indemnitor.

Petitioner's grammatical construction of the first sentence of paragraph 12 as referring to the use of the tracks by Union Camp, not by the railroads, is buttressed by the balance of that paragraph. The second sentence states that Union Camp indemnifies the railroads from "all loss, damage and expense growing in any manner out of *such acts, defaults or negligence of Union Camp* . . . or in any manner growing out of defaults in trackage owned and maintained by Union Camp" (emphasis added). All acts and neglects of this indemnity plainly, clearly and unequivocally refer to Union Camp alone.

C. Under the established doctrine of *ejusdem generis*, the word "use" in the introductory language to paragraph 12 must be interpreted in the same manner as the accompanying words "construction," "operation," "repair," "alteration," and "maintenance" of the tracks – all functions and responsibilities of Union Camp, not of the indemnitee railroads.

D. In the *L. & N. R. Co.* case, the liability of the indemnitee to the complainant was appropriately established, while the indemnitee in the instant case has been finally adjudicated as not liable to the plaintiff in any amount whatever.

E. The indemnity sued upon in *L. & N. R. Co.* was for damages recovered by the plaintiff, while the amounts sought in this case are the out-of-pocket costs and expenses of the indemnitee in its successful defense against the plaintiff.

The ultimate question in this case is whether the contract plainly reflects that the contracting parties must have contemplated and specifically provided for indem-

nification of the indemnitee's own negligence. There is clearly no such language involved in the document at bar, and no authority warrants a re-writing of the agreement to insert a term never bargained for – the indemnitee's negligent operation of locomotives or cars on the tracks.

4. SAID INTERPRETATION ALLOWS INDEMNIFICATION OF A PARTY WHO HAS BEEN ADJUDICATED AS WITHOUT LIABILITY TO THE COMPLAINANTS.

Georgia law uniformly holds that an indemnitee must be liable to the plaintiff in some fashion before he can seek recovery over against an indemnitor. See, *e.g.*, *Southern Nitrogen Co. v. Stevens Shipping Co.*, 114 Ga. App. 581, 151 S.E.2d 916 (1966); and *Batson-Cook Co. v. Georgia Marble Setting Co.*, 112 Ga. App. 226, 144 S.E.2d 547 (1965).

5. SAID INTERPRETATION IGNORES THE GEORGIA COMPARATIVE NEGLIGENCE RULE IN *U.S. V. SECKINGER*.

The Fifth Circuit, at 4110, holds that paragraph 12 "makes clear" that Appellant although adjudicated 15% negligent must indemnify for "the entire loss, even though the railroad was the other tortfeasor." This approach overlooks the doctrine of comparative negligency as enunciated recently in *Southern Railway Co. v. Brunswick Pulp & Paper Co.*, 376 F.Supp. 96 (S.D.Ga. 1974). *Southern Railway*, after discussing the effect of *United States v. Seckinger*, 397 U.S. 203 (1969), extends the reasoning of that case to contractual indemnity under Georgia law. If Union Camp is responsible for any costs in this action, it cannot be responsible for more than 15% of the costs.

6. SAID INTERPRETATION FAILS TO CONSTRUE THE INDEMNITIES IN CONTEXT.

The holding of the Fifth Circuit overlooks the fact that the indemnity agreement contained in paragraph 9C of the subject contract (stipulated by the parties as not applicable to the issues of the instant case) indemnifies against all loss, cost, and expenses, "including attorney's fees, claims, suits . . . ." This express enumeration of fees and expenses in one indemnity provision when coupled with the conspicuous absence of any such language in either of the two indemnities under consideration from the same agreement indicates strongly the intention of the parties not to indemnify against attorney's fees in paragraphs 5 and 12. *Expressio unius est exclusio alterius.* To hold otherwise is to construe the indemnity agreement strictly against the indemnitor.

Moreover, the Fifth Circuit has overlooked the fact that the indemnities of paragraphs 5 and 12 were plucked out of context from a lengthy agreement containing five different indemnities. If paragraph 12, or paragraph 5 in conjunction with paragraph 12, were as general as the Court's opinion suggests, the other indemnities would be surplusage.

The cardinal rule of construction is to ascertain the intention of the parties. In isolating two indemnities from a lengthy agreement, the court has done violence to the intention of the parties as gathered from the instrument as a whole.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: October 7, 1977

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3884

D.C. Docket No. CA-CV474-183
RAY D. BROWN and NANCY JANE BROWN,
Plaintiffs,

versus
SEABOARD COAST LINE RAILROAD COMPANY,
Defendant-Appellee,

versus
UNION CAMP CORPORATION,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

Before WISDOM and GEE, Circuit Judges, and BOOTLE*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the Judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 27, 1977

Issued as Mandate:

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*Senior District Judge of the Middle District of Georgia, sitting by designation.

[1299] **Ray D. BROWN and Nancy Jane Brown, Plaintiffs,**

v.

SEABOARD COAST LINE RAILROAD COMPANY, Defendant-Appellee,

v.

UNION CAMP CORPORATION, Defendant-Appellant.

No. 75–3884.

United States Court of Appeals, Fifth Circuit.

June 27, 1977.

In a diversity action, plant owner appealed a decision of the United States Dis-
[1300] **trict Court for the Southern District of Georgia, at Savannah, Anthony A. Alaimo, Chief Judge, that the owner was liable under an indemnity agreement it had entered into with codefendant railroad. The Court of Appeals, Bootle, District Judge, sitting by designation, held that (1) when construed in light of the purposes of railroad switching agreement, one part of which was**

the indemnity agreement which fixed the rights and liabilities of plant owner and several railroads in connection with railroad operations at the plant, the language of the indemnity agreement's fifth and twelfth paragraphs, the former containing protection against a specific kind of loss, viz., railroad crossing accidents, and the latter indemnifying railroads against loss arising from a specific activity, viz., use of tracks, was sufficiently specific to protect codefendant railroad from its own negligence, (2) at least with respect to contractual indemnity, a judgment fixing liability is not, under Georgia law, a prerequisite to recovery on the contract; moreover, in the instant case, railroad switching agreement, of which indemnity agreement was a part, did not specify the requirement of a judgment as a condition precedent to recovery and thus the right of indemnity existed without regard to whether a judgment against indemnitee railroad was obtained, and (3) with respect to the kinds of damages covered by an indemnity agreement, the rule is that general, broad words operate to encompass most legitimate expenses; thus, in the instant case, once the right of indemnity was established, provisions of the agreement describing recoverable losses as "any and all loss, cost, damage and expense" and

"all loss, damage and expense" were sufficiently broad to encompass attorney's fees and costs of action brought against the indemnitee.

Affirmed.

1. Indemnity ⇐8.1(1)

Under Georgia law, indemnity contracts will hold an indemnitee harmless against its own negligence only when the intent to so indemnify is expressed in plain, clear and unequivocal terms.

2. Indemnity ⇐8.1(1)

All-inclusive terms in an indemnity agreement such as "all risk of loss" or "any and all liability" do not operate to sweep in the negligence of all parties, such as a negligent indemnitee, when the question is whether the right of indemnity exists at all.

3. Indemnity ⇐8.1(1)

Although the intent of an indemnity agreement to hold an indemnitee harmless against its own negligence must be clear, no talismanic language is necessary to precipitate the indemnification of a negligent indemnitee, and in consequence, a court must closely examine the language of a contract

in each case to determine whether the parties have shown an obvious intention to protect the indemnitee against loss for its own tortious conduct; furthermore, it is appropriate in construing the contract to consider the circumstances surrounding the entering of the agreement and its overall purpose.

4. Indemnity ⇐8.1(3)

When construed in light of the purposes of railroad switching agreement, one part of which was an indemnity agreement which fixed the rights and liabilities of plant owner and several railroads in connection with railroad operations at the plant, the language of the indemnity agreement's fifth and twelfth paragraphs, the former containing protection against a specific kind of loss, viz., railroad crossing accidents, and the latter indemnifying railroads against loss arising from a specific activity, viz., use of the tracks, was sufficiently specific to protect codefendant railroad from its own negligence.

5. Indemnity ⇐11

At least with respect to contractual indemnity, a judgment fixing liability is not, under Georgia law, a prerequisite to

recovery on the contract; moreover, in the instant case, railroad switching agreement, of which indemnity agreement was a part, did not specify the requirement of a judgment as a condition precedent to recovery
[1301] and thus the right of indemnity existed without regard to whether a judgment against indemnitee railroad was obtained.

6. Indemnity ⇐8(1)

With respect to the kinds of damages covered by an indemnity agreement, rule is that general, broad words operate to encompass most legitimate expenses; thus, in the instant case, once the right of indemnity was established, provisions of the agreement describing recoverable losses as "any and all loss, cost, damage and expense" and "all loss, damage and expense" were sufficiently broad to encompass attorney's fees and costs of action brought against the indemnitee.

Edward T. Brennan, Savannah, Ga., for defendant-appellant.

Arnold C. Young, Malcolm R. Maclean, F. Saunders Aldridge, III, Savannah, Ga., for Seaboard Coast Line R.R.

Appeal from the United States District Court for the Southern District of Georgia.

Before WISDOM and GEE, Circuit Judges, and BOOTLE *, District Judge.

BOOTLE, District Judge:

In this diversity action, Union Camp Corporation (Union Camp) appeals the decision of the district court that Union Camp is liable under an indemnity agreement it entered into with Seaboard Railroad Company (Seaboard). The district court held that Seaboard was indemnified against its own negligence. We affirm.

I.

The indemnity provisions in question are part of a railroad switching agreement which fixed the rights and liabilities of Union Camp and several railroads in connection with railroad operations at a Union Camp plant near Savannah, Georgia. The controversy concerning the application of the agreement was precipitated by a crossing accident in which one Ray D. Brown was struck by a Seaboard switch engine operating on Union Camp tracks at the plant site. Brown brought suit in state court and alleged that both Seaboard and

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* Senior District Judge of the Middle District of Georgia sitting by designation.

Union Camp had negligently caused his injuries.[1] Upon removal of the case to federal court, Seaboard brought a cross-claim against Union Camp asserting that it had promised in the switching agreement "to protect, hold harmless and indemnify (Seaboard) . . . against any and all loss, cost, damage and expense accruing (on) account of any road crossing at grade with tracks of Union Camp." Seaboard further asserted that Union Camp had promised that in the use of the tracks it would assume "all risk of . . . loss or damage . . . caused directly or indirectly or contributed to . . . by the negligence of Union Camp."

The jury returned a verdict on the plaintiff's claim in the form of special interrogatories which apportioned fault for the accident as follows:

Plaintiff:	45%
Seaboard:	40%
Union Camp:	15%

1. The plaintiff asserted at trial that the negligence on the part of Union Camp was the placing of a small building so near the tracks that it presented an obstruction which blocked the view of crossing vehicles.

Because Brown's negligence exceeded that of either defendant, judgment was entered against him. *Wilson v. Harrell,* 87 Ga.App. 793, 799, 75 S.E.2d 436, 442 (1953); *Mishoe v. Davis,* 64 Ga.App. 700, 707–8, 14 S.E.2d 187, 193 (1941). Seaboard then pressed its cross-claim before the court for indemnification as to its cost of the action and attorney's fees, asserting that under the provisions of the indemnity agreement outlined above, it was entitled to compensation for these losses. Union Camp responded that the contract plainly lacked the clear and unequivocal language necessary for indemnification of this nature. The district court ruled, however, that the agreement carried
[1302] the intent that the indemnitee Seaboard would be protected against its negligence and Union Camp now appeals that determination.

II.

[1–3] This case poses the recurring question whether an indemnity agreement which makes no explicit reference to the indemnitee's negligence can nonetheless suffice to relieve the indemnitee of losses occasioned by its negligence.[2] Georgia fol-

2. This court has been faced with this identical issue many times. *Steed v. Central of Georgia*

[footnote continued]

lows in this respect the well accepted general rule that indemnity contracts will hold an indemnitee harmless against its own negligence only when the intent to so indemnify is expressed in "plain, clear, and unequivocal terms." *Batson-Cook Co. v. Georgia Marble Setting Co.*, 112 Ga.App. 226, 230, 144 S.E.2d 547, 550 (1965); *Rome Builders Supply v. Rome Kraft Co.*, 104 Ga.App. 488, 489, 122 S.E.2d 133, 134 (1961); *Bohannon v. Southern Ry. Co.*, 97 Ga.App. 849, 850, 104 S.E.2d 603, 605 (1958).[3] Although the

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Ry. Co., 529 F.2d 833 (5th Cir. 1976); *United States v. Seckinger*, 408 F.2d 146 (5th Cir. 1969) *rev'd* 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970); *James F. O'Neill Co. v. United States Fidelity and Guar. Co.*, 381 F.2d 783 (5th Cir. 1967); *American Agricultural Chemical Co. v. Tampa Armature Works*, 315 F.2d 856 (5th Cir. 1963); *Jacksonville Terminal Co. v. Railway Express Agency*, 296 F.2d 256 (5th Cir.) *cert. denied* 369 U.S. 860, 82 S.Ct. 949, 8 L.Ed.2d 18 (1962); *Travelers Ins. Co. v. Busy Electric Co.*, 294 F.2d 139 (5th Cir. 1961); *Batson-Cook Co. v. Industrial Steel Erectors, Inc.*, 257 F.2d 410 (5th Cir. 1958).

3. *See United States v. Seckinger*, 397 U.S. 203, 211, 90 S.Ct. 880, 25 L.Ed.2d 224, 233 (1970); Annot., 175 A.L.R. 8, 29–38 (1948); 52 C.J.S. *Indemnity* § 12 (1944). Indemnity agreements usually contain very broad language such as "all risk of loss" and "any and all liability". [footnote continued]

intent must be clear, no talismanic language is necessary to precipitate the indemnification of a negligent indemnitee, *see Georgia Ports Authority v. Central of Georgia*, 135 Ga.App. 859, 219 S.E.2d 467 (1975), and in consequence, a court must closely examine the language of a contract in each case to determine whether the parties have shown an obvious intention to protect the indemnitee against loss for its own tortious conduct.[4] Furthermore it is appropriate in construing the contract to consider the circumstances surrounding the entering of the agreement and its overall purpose. *Batson-Cook Co. v. Georgia Marble Setting Co., supra; Louisville & Nashville R.R. Co. v.*

All-inclusive terms of this nature do not operate to sweep in the negligence of all parties, such as a negligent indemnitee, when the question is whether the right of indemnity exists at all. As Judge Brown stated in *Batson-Cook Co. v. Industrial Steel Erectors*, 257 F.2d 410, 414 (5th Cir. 1958), "(i)t is an area in which to cover *all* does not include one of the parts." (Emphasis original). The problem, of course, is that the all inclusive language is too broad to meet the law's requirement that a negligent indemnitee be protected against its negligence only when the contractual language specifically so provides.

4. *See e. g. Jacksonville Terminal Co. v. Railway Express Agency, supra.*

Atlantic Co., 66 Ga.App. 791, 19 S.E.2d 364 (1942).

[4] The language of paragraphs 5 and 12, when construed in the light of the purposes of this railroad switching agreement, is sufficiently specific to protect Seaboard from its negligence. That language provides in pertinent part as follows:

> 5. When deemed necessary by the Plant Switching Railroads, Union Camp will, at its expense, install, maintain and operate such road crossing protection as may be specified and considered necessary by the Plant Switching Railroads at any road crossing at grade over tracks of Union Camp; or, in lieu thereof, protect same with crossing watchman; Union Camp, at all times, to protect, hold harmless and indemnify the Plant Switching Railroads and S&A, collectively and individually, against any and all loss, cost, damage and expense accruing [sic] account of any road crossing at grade with tracks of Union Camp.
>
> 12. In the construction, operation, use, repair, alteration or maintenance of the tracks, or any tracks adjacent thereto or connected therewith, covered by this

> agreement or of the right of way, or any building, structure, equipment or work of
> [1303] any nature connected in any manner therewith, Union Camp hereby assumes all risk of, and liability for, loss or damage to any property or injury or death to any person, caused directly or indirectly, or contributed to, by the acts, defaults, or negligence of Union Camp, or any agent, employee or representative in its service or under its control, or by defects in trackage owned and maintained by Union Camp. Union Camp will further indemnify and save harmless the Plant Switching Railroads and S&A, or each of them, from all loss, damage and expense growing in any manner out of such acts, defaults or negligence of Union Camp, its agents, employees or representatives in its service or under its control, or in any manner growing out of defects in trackage owned and maintained by Union Camp.

First, paragraph 12 indemnifies the railroad against loss arising from a specific activity, namely, the *use* of the tracks. In the context of a railroad switching agreement in which the primary purpose is to provide for the rights and liabilities of the

railroads in their use of the Union Camp tracks, the employment of the phrase "use of the tracks" as an activity from which the railroad will be indemnified is a compelling indication that the indemnitee will be protected against its negligence.

In *Louisville & Nashville R.R. Co. v. Atlantic Co., supra,* which involved a similar railroad switching agreement, the Georgia Court of Appeals held that the railroad was indemnified against its own negligence because the agreement contained protection against all loss arising from "the operation of locomotives and cars" over the indemnitor's tracks. Despite the lack of an explicit reference to the indemnitee's negligence, the contract's provision for indemnity for loss arising from a specific kind of activity sufficed to show the intention of the parties to indemnify the railroad:

> The contract contemplates only the operation, on the defendant's spur track of locomotives or cars by the plaintiffs, and, consequently, the negligence to be indemnified against was that of such railroad companies. If they were not to be indemnified for their negligence, it was an idle ceremony in using the words, "or the operation of locomotives or cars thereover" . . ..

Id. at 800, 19 S.E.2d at 370.

Similarly, when Union Camp and the switching railroads placed the phrase "use . . . of the tracks" in paragraph 12, this manifested an intent to indemnify the railroads, the parties contractually permitted to use the tracks. *Accord, Cacey v. Virginian Ry. Co.,* 85 F.2d 976 (4th Cir. 1936); *Russell v. Martin,* 88 So.2d 315, 317 (Fla.1956).

Second, the phrase "loss . . . contributed to . . . by the negligence of Union Camp" in paragraph 12 makes clear that the parties contemplated that Union Camp would indemnify the railroad not only for the indemnitor's negligence, but also the negligence of the person who was a tortfeasor in conjunction with Union Camp. The jury determined that Union Camp had indeed "contributed to" the loss in the amount of 15%. This determination in effect triggered Union Camp's obligation to indemnify the railroad for the entire loss, even though the railroad was the other tortfeasor. This conclusion is greatly strengthened, of course, by the earlier conclusion that the phrase "use of the tracks" manifested an intention to protect the railroad from its own negligence.

Finally, paragraph 5, although worded quite differently than paragraph 12, adds

further weight to the conclusion that the contract provides for the indemnification of the negligent indemnitee. It contains protection against a specific kind of loss, railroad crossing accidents. While this reference alone may be insufficient to indicate an intention that the railroad be indemnified against those accidents it causes, nonetheless a party likely to be adjudicated as being in some degree at fault in a crossing accident is the railroad. This consideration, when coupled with the language of paragraph 12, buttresses the conclusion that the intent of the parties arising from the en-
[1304] tirety of the contract is that Seaboard should be held harmless for its own negligence.

III.

[5] Union Camp asserts that two other errors require a reversal of the district court. First, Union Camp argues that even if the railroad is indemnified, a judgment imposing liability for damages must first be obtained before the indemnity agreement will provide protection. Since the plaintiff failed to recover anything in this case, Seaboard has supposedly incurred no loss within the meaning of the contract. It is clear

that Georgia law does not require that a judgment first be obtained against the indemnitee. In *Robert & Co. Assoc. v. Pinkerton & Laws,* 120 Ga.App. 29, 33, 169 S.E.2d 360, 364 (1969), the indemnitee, suing on an indemnity contract, recovered sums which it had paid out in settlement of a case. Hence, at least with respect to contractual indemnity, a judgment fixing liability is not a prerequisite to recovery on the contract. *Accord, Rite Diet Feeds v. Central of Georgia R.R. Co.,* 136 Ga.App. 14, 16, 220 S.E.2d 22, 24 (1975). Moreover, the railroad switching agreement did not specify the requirement of a judgment as a condition precedent to recovery and thus the right of indemnity exists here without regard to whether a judgment against the railroad was obtained.

[6] Second, in a somewhat related contention, Union Camp argues that the indemnity agreement does not provide for payment of attorney's fees and costs of the action despite the agreement's broad language. Paragraphs 5 and 12 describe the recoverable losses, respectively, as "any and all loss, cost, damage and expense" and "all loss, damage and expense." Unlike the "clear and unequivocal" rule discussed

above which requires great specificity in delimiting the right of indemnity, the rule with respect to the kinds of damages covered by an indemnity agreement is that general, broad words operate to encompass most legitimate expenses. *B & G Electric Co. v. G.E. Bass & Co.*, 252 F.2d 698, 701 (5th Cir. 1958).[5] Thus, once the right of indemnity is established, words such as those appearing in paragraph 5 and 12 are sufficiently broad to encompass attorney's fees and costs of the action. Hence, we must hold against Union Camp on this point as well.

All the other contentions of Union Camp are without merit and do not warrant discussion. Accordingly, the judgment of the district court is AFFIRMED.

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5. See e. g., *Cormier v. Rowan Drilling Co.*, 549 F.2d 963, 971 (5th Cir. 1977); *Kelloch v. S & H Subwater Salvage, Inc.*, 473 F.2d 767, 771, (5th Cir. 1973); *Mississippi Power Co. v. Roubicek*, 462 F.2d 412, 417 (5th Cir. 1972); *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 314 (5th Cir. 1969); *see generally* 41 Am.Jur.2d, *Indemnity*, § 36, p. 725–26 (1968). Although apparently no Georgia case has ruled on this precise question, it seems quite likely that it would follow the general rule because Georgia courts have previously defined "indemnity" very broadly to mean "reimbursement, restitution, or compensation." *Parker v. Puckett*, 129 Ga.App. 265, 267, 199 S.E.2d 343, 346 (1973).

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

August 25, 1977

TO ALL PARTIES LISTED BELOW:

No. 73-3884 – RAY D. BROWN, ET AL v. SEABOARD COAST LINE RAILROAD CO. v. UNION CAMP CORP.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,*and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk

By /s/ Brenda M. Hawk
Deputy Clerk

*on behalf of appellant, Union Camp Corp.,

APPENDIX C

THIS AGREEMENT, made and entered into this 1st day of May, 1967, between ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia corporation, hereinafter called Coast Line; SEABOARD AIR LINE RAILROAD COMPANY, a Virginia corporation, hereinafter called Seaboard; and CENTRAL OF GEORGIA RAILWAY COMPANY, a Georgia corporation, hereinafter called Central; said three parties being hereinafter collectively referred to as Plant Switching Railroads; UNION CAMP CORPORATION, a Virginia corporation, hereinafter called Union Camp; and SAVANNAH AND ATLANTA RAILWAY COMPANY, a Delaware corporation, hereinafter called S&A.

W I T N E S S E T H: – that

WHEREAS, under date of May 1, 1942, a certain contract was entered into for a term of twenty-five years between L. R. Powell, Jr., and Henry W. Anderson (as Receivers for the property of Seaboard Air Line Railway Company), Atlantic Coast Line Railroad Company, Savannah and Atlanta Railway Company, Southern Railway Company, M. P. Callaway (as Trustee for the property of Central of Georgia Railway Company, Chatham Terminal Company, and Union Bag and Paper Corporation, to provide a basis for railroad operations at the plant of Union Bag and Paper Corporation (the predecessor of Union Camp Corporation), located near Savannah, Chatham County, Georgia; and

WHEREAS, the Plant Switching Railroads will desire to continue providing service to Union Camp's plant after expiration of the term of the said contract dated May 1, 1967, to provide service under the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of One Dollar ($1.00) by each of the parties to the other paid, the receipt of which is hereby acknowledged, and in further consideration of the premises and of the covenants and agreements herein contained, to be kept and performed by the parties hereto, it is mutually agreed as follows, to wit:

1. (a) All inbound and outbound cars will be delivered and received in the yard of Union Camp by Coast Line, Seaboard, Central and S&A. Central will not only handle cars for its own account into and out of the yard, but will also provide this service for Southern Railway Company as well.

(b) Union Camp hereby grants Coast Line, Seaboard, and Central the right to jointly operate all tracks of Union Camp lying west of the Seaboard main line track for the purpose of serving its plant, and said Railroad Companies agree to operate or cause to be operated, all such tracks. The switching of the plant shall be rotated by the Plant Switching Railroads and cars of all lines, including those of Savannah and Atlanta Railway Company and Southern Railway Company, will be switched indiscriminately. The plant of Union Camp shall be switched on 24-hour basis. Each of the Plant Switching Railroads switch one trick (8 hours) daily initially furnishing two yard engine crews for performance of switching service during its assigned trick, and thereafter crew assignments to be adjusted by mutual consent as conditions warrant. During the first contract year under this agreement, the Union Camp's plant shall be switched on the following basis:

May 1, 1967 through April 30, 1968

First Trick – 7:00 A.M. to 3:00 P.M. – Seaboard
Second Trick – 3:00 P.M. to 11:00 P.M. – Central
Third Trick – 11:00 P.M. to 7:00 A.M. – Coast Line

(c) On the first day of each succeeding contract year under this agreement, the assigned switching tricks of the Plant Switching Railroads shall be rotated in sequence.

(d) Supervision of crews of all Plant Switching Railroads will be provided at all times hereunder by a general yardmaster to be selected and furnished by the Plant Switching Railroads. The general yardmaster shall be assigned for a tour of duty hereunder of not less than one contract year. Such general yardmaster will supervise all shifts and shall be assigned to other duties. In the appointment and in the determination of a general yardmaster's length of tour in the performance of this contract, the Plant Switching Railroads shall give due regard to the convenience and operating necessities of Union Camp Corporation so as to provide continuity and uniformity in the switching operations to be performed under this agreement.

2. (a) The Plant Switching Railroads, together with Savannah and Atlanta Railway Company and Southern Railway Company, jointly own, and shall continue to own, the 936-foot connecting track designated as "A-B-C" on print of Plan No. 14172, hereto attached and made a part of this agreement. A portion of the said 936-foot connection track is located on right of way of Chatham Terminal Company and the remainder on property for which Railroads hold easement.

(b) Seaboard owns, and shall continue to own, two segments of tracks, designated as "E-F" and "G-H", located on Seaboard's right of way and shown on print of Plan No. 14172, which segments of track form a connection between Seaboard's main line track and trackage of Union Camp.

(c) Union Camp owns, and shall continue to own, all trackage within its plant area covered by this agreement.

3. Union Camp shall continue to provide, without cost to the other parties to this agreement, all necessary right of way over its property to permit train operations to serve its plant.

4. Union Camp shall, at its expense, maintain and/or renew trackage of its ownership to the satisfaction of the Plant Switching Railroads, and connecting trackage of the Railroads shall be maintained without expense to Union Camp.

5. When deemed necessary by the Plant Switching Railroads, Union Camp will, at its expense, install, maintain and operate such road crossing protection as may be specified and considered necessary by the Plant Switching Railroads at any road crossing at grade over tracks of Union Camp; or, in lieu thereof, protect same with crossing watchman; Union Camp, at all times, to protect, hold harmless and indemnify the Plant Switching Railroads and S&A, collectively and individually, against any and all loss, cost, damage and expense accruing account of any road crossing at grade with tracks of Union Camp.

6. When deemed necessary by the Plant Switching Railroads, and after thirty (30) days' written notice to that effect, Union Camp will, at its own expense, as may be required from time to time, promptly provide and furnish watchman for properly policing the tracks and premises, and will also, at its expense, as and when deemed necessary by the Plant Switching Railroads, furnish and provide, own and maintain such additional tracks on its premises as may be necessary for the proper handling of the business of Union Camp, and will further furnish and provide such fence or fences, of a design and at such locations designated by the Plant Switching Railroads, to protect against trespassers, accidents, and pilfering of property in the possession of the Plant Switching Railroads.

7. Union Camp will furnish, at its expense, at two locations on its property to be designated by the Plant Switching Railroads, proper facilities for watering engines and will supply water, free of charge, at such locations, to all engines operating on tracks of Union Camp.

8. Union Camp will furnish at its expense an adequate office for the accommodation and use of employees that may be required by the Plant Switching Railroads for handling the proper operation of said tracks of Union Camp. All taxes and other charges accruing upon or incidental to the property, tracks, and other facilities provided and owned by Union Camp will be assumed by Union Camp.

9. (a) Except by agreement, Union Camp will provide, and at all times maintain, along the entire length of yard and lead tracks, a lateral clearance at least twelve and one-half (12½) feet on each side of the center line of such tracks; provided, however, that existing trackage, structures and buildings may be extended along present alignments. As to all other tracks along their entire length, Union Camp will maintain the present lateral clearance on each side of the center line of the tracks and, except by agreement, will not establish, for additional tracks, other than yard and lead tracks, any lateral clearance less than eight (8) feet on each side of center line of the tracks; provided, however, that existing clearances may be continued and existing trackage, structures and buildings may be extended along present alignments. Vertical clearance for present tracks, as now established, will be continued, and for future tracks, including yard and lead tracks, except by mutual agreement, vertical clearance will be maintained over all tracks at twenty-two (22) feet above top of rail, over the entire width of the specified lateral clearances. All wires sus-

pended over the trackage shall be placed and maintained at the elevations and in accordance with the standards prescribed by the National Electric Safety Code for the voltage carried, and all structures erected over the trackage shall be built and maintained in a manner satisfactory to the Plant Switching Railroads and S&A.

(b) Union Camp, at its expense, will erect and maintain signs warning of the close clearance at all locations were existing clearances do not meet the standard clear ance requirements set out above.

(c) Notwithstanding the provisions of Article 12 or any other provision hereof, by reason of the additional hazard created by the structures or other installations which do not meet the clearance requirements set forth in Article 9(a) above, regardless of whether the substandard clearances are presently in existence or created subsequent to the date of this agreement, Union Camp shall and does hereby assume entire responsibility for and agrees to indemnify and hold harmless the Plant Switching Railroads and S&A, individually and collectively, and their successors and assigns, from and against all loss, costs, expense, including attorneys' fees, claims, suits and judgments whatsoever resulting from injury to or death of any person or persons, including but not limited to employees of the Plant Switching Railroads and S&A, or destruction of or damage to any property caused by or in any manner arising out of the presence or use of said substandard clearances, whether such injury, death, destruction or damage results from negligence of the Plant Switching Railroads and S&A, their employees or otherwise, excluding, however, any willful or wanton acts of the Plant Switching Railroads and S&A, or their employees.

10. Union Camp will keep the tracks owned by it and operated under this agreement free from all commodities, rubbish, trash, obstructions, or other objects which may prove a danger to those engaged in the operation of said tracks, and will indemnify the Plant Switching Railroads and S&A, or each of them, from all claims and demands against them by reason of any loss, damage or injury growing out of or caused by the failure of Union Camp to keep the said tracks free from obstructions and onjects aforesaid.

11. It is mutually agreed by the parties hereto that all carload shipments consigned to Union Camp for delivery shall be deemed to have been fully and completely delivered as soon as the car containing such shipment shall have been placed on the plant tracks designated for loading or unloading and detached from the engine or train by which it was moved, and the Plant Switching Railroads and S&A, or each of them, shall thereupon be fully and completely relieved of any liability, either as common carrier or as bailee or otherwise, for loss of or injury to such car or shipment occurring after such delivery, and that the said Plant Switching Railroads and S&A shall not be liable as common carrier, nor as bailee, nor otherwise, for any property loaded into any car until said car is attached or coupled to the engine or train by which it is to be moved from said plant tracks toward its destination, or until a bill of lading shall have been issued to Union Camp therefor, and that until said car is so attached or coupled up, or a bill of lading is issued therefor, the said car and its contents shall be deemed and held to be in the possession of Union Camp so far as liability therefor is concerned.

12. In the construction, operation, use, repair, alteration or maintenance of the tracks, or any tracks adjacent

thereto or connected therewith, covered by this agreement, or of the right of way, or any building, structure, equipment or work of any nature connected in any manner therewith, Union Camp hereby assumes all risk of, and liability for, loss or damage to any property or injury or death to any person, caused directly or indirectly, or contributed to, by the acts, defaults, or negligence of Union Camp, or any agent, employee or representative in its service or under its control, or by defects in trackage owned and maintained by Union Camp. Union Camp will further indemnify and save harmless the Plant Switching Railroads and S&A, or each of them, from all loss, damage and expense growing in any manner out of such acts, defaults or negligence of Union Camp, its agents, employees or representatives in its service or under its control, or in any manner growing out of defects in trackage owned and maintained by Union Camp.

13. Union Camp assumes the duty of keeping the right of way of the tracks covered by this agreement, and the property adjacent to such tracks, clean and clear of inflammable materials, except the combustible contents of cars on the tracks, and assumes all risk of loss or damage to its property, or to property of others in its possession or under its control, situated on or in the vicinity of the tracks, when such damage is occasioned by fire set out by engines or other machinery of, or fire in any manner caused by the Plant Switching Railroads and S&A, or any of them, and hereby releases and discharges the Plant Switching Railroads and S&A, or each of them, from all liability for such loss or damage. Union Camp will further indemnify and save harmless the Plant Switching Railroads and S&A, or each of them, from all loss, cost and expense resulting from loss of or damage to property of others in the care or custody of Union Camp, or stored or placed by or with Union Camp's consent on

or near the tracks, resulting from fire occasioned as aforesaid.

14. This agreement shall be for a term of twenty-five (25) years, with the option on the part of the Plant Switching Railroads and S&A to the extent of S&A's interests herein to renew same for an additional twenty-five (25) year period, provided the Plant Switching Railroads and S&A serve written notice on Union Camp one (1) year in advance of its termination, of their intention to renew same. However, should Union Camp default in any of its obligations hereunder and should said default continue for thirty (30) days after written notice thereof has been given to Union Camp, then, on thirty (30) days' written notice to Union Camp of its intention to do so, any railroad, party hereto, may cease to be a party to this contract, or the Plant Switching Railroads and S&A to the extent of S&A's interests herein may terminate this contract.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be signed, in quintuplicate, by its officers thereunto duly authorized, as of the date first above written.

ATTEST:

ATLANTIC COAST LINE RAILROAD COMPANY;

/s/ W.T. Marable
W.T. Marable

By: /s/ D.C. Hastings
D.C. Hastings, Vice-President, Operations

ATTEST:

SEABOARD AIR LINE RAILROAD COMPANY:

/s/ [Illegible]
SECRETARY

By: /s/ Howard P. Foley
Vice President

ATTEST:

CENTRAL OF GEORGIA RAILWAY COMPANY:

/s/ M. M. McLaughlin
[Title Illegible]

By: [Illegible]
Executive Vice President

ATTEST:

UNION CAMP CORPORATION:

/s/ [Illegible]
Asst. Secretary

By: /s/ J.D. Patterson
Vice President

ATTEST:

SAVANNAH AND ATLANTA RAILWAY COMPANY:

/s/ M.W. Nease

By: [Illegible]
Vice President

APPENDIX D

IN THE SUPERIOR COURT OF
CHATHAM COUNTY, GEORGIA

GEORGE C. SAMMONS d/b/a G.C. SAMMONS TRUCKING CO.	)	
vs.	)	Civil Action No. 9894
UNION CAMP CORPORATION, ET AL.	)	

ORDER

In the main trial of this case the Jury returned a verdict on special interrogatories and declared the plaintiff to be 25% negligent, the two Railroads 75% negligent, and the remaining defendants, including Union Camp, not negligent.

A cross-claim by Central and Seaboard Railroads against Union Camp seeking recovery under an alleged indemnification contract was severed from the trial of the main case. That issue is now before the Court in the form of Summary Judgments filed by both Railroads and Union Camp. The Railroads and Union Camp agreed that the question of indemnity can be settled by Summary Judgment, but this is the last thing they agree on.

The Railroads were operating a railroad owned by Union Camp on Union Camp's property under a contract that includes the indemnity provision in question. The Railroads contend under paragraph 5 of the contract that they are indemnified against any loss, including loss caused by their own negligence, arising out of accidents at grade crossings on Union Camp's property. Union Camp contends that the indemnity provision does not cover accidents caused by the Railroads' negligence and

that since the jury has found the Railroads to be negligent, Union Camp cannot be held liable to Railroads on the cross-claim.

Paragraph five reads as follows:

> "When deemed necessary by the Plant Switching Railroads, Union Camp, at its expense, install, maintain, and operate such road switching protection as may be specified and considered necessary at grade over tracks of Union Camp; or, in lieu thereof protect same with crossing watchmen; Union Camp, at all times, to protect, hold harmless, and indemnify the Plant Switching Railroads and S. & A. collectively and individually, against any and all loss, cost, damage, and expense accruing account of any road crossing at grade with tracks of Union Camp."

It should be noted at this point that the contract contains several other paragraphs indemnifying the Railroads within certain areas. For example, paragraph 9 (c) indemnifies the Railroad against damages caused by substandard clearances; paragraph 10 indemnifies the Railroads against injuries or damages caused by obstructions and the like on the tracks; paragraph twelve indemnifies the Railroads against negligence of Union Camp in maintaining the tracks which it agreed to do.

It appears clear that the indemnities referred to in the contract pertain to the activities set out in the paragraphs containing the indemnities.

Back now to paragraph 5. The first part of this paragraph down to the first semicolon requires Union Camp to install, at its expense, protective devices at grade crossings when the Railroads deem such devices necessary. The second part of the paragraph down to the second semicolon gives Union Camp the right to provide

a crossing watchman in lieu of the protection devices; the third part of the sentence is a broadly worded statement in which Union Camp indemnifies the Railroads ". . . against any and all loss . . . at grade crossings account of any road crossing at grade with tracks of Union Camp." The key words are "any and all loss". What do they mean? Before answering that question, some general observations about the case law should be made.

A strong body of case law exists which holds that a contract of indemnity will not be construed as holding the indemnitor liable to the indemnitee for the indemnitee's own negligence unless the contract states that obligation in clear and unequivocal language. *Bohannan v. Southern Railroad Co.*, 97 Ga. App. 849;*Rome Builders v. Rome Craft Co.*, 104 Ga. App. 488 (3); 175 A.L.R. 8, 30.

The Courts have also held ". . . General words alone do not necessarily import an intent to hold an indemnitor liable for damages resulting from the negligence of the indemnitee and that no inference therefrom can establish such intent." 175 ALR 8, 30, et seq. In *Massee and Felton Lumber Co.* v. Ga. and Florida Railroad, 143 Ga. 173, the Supreme Court held that a provision of a contract that "the said Lumber Company shall hold the said Railway Company free and harmless from all damage or loss to all persons or property of all persons caused by the operations of said trains of said Lumber Company on track of the said Railway Company," did not excuse the Railroad from liability created by its own negligence. In *Batson-Cook Company v. Georgia Marble Setting Co.*, 112 Ga. App. 226, the Court held that an indemnity provision that made the subcontractor responsible and liable ". . . for losses, expenses, demands, and claims in connection with or arising out of any injury . . . or dam-

ages . . ., to property of Contractor or others sustained or alleged to have been sustained in connection with or to have arisen out of or resulting from the performance of the work of the subcontractor . . ." was not a plain, clear, and unequivocal expression sufficient, together with consideration of the entire contract, to create a responsibility on the part of the subcontractor to pay for the negligence of the general contractor.

Union Camp will be responsible for the sole negligence of the Railroad through its employees.

Throughout the contract the indemnity provisions are clearly designed to protect the Railroads against third-party claims or the negligence of Union Camp or any of its employees.

Paragraph 5 is consistent with this theme. It does not seem logical that the Railroads would seek protection against the negligence of its own employees at grade crossings and not seek the same protection against negligence of its employees at other points along the tracks.

Therefore, it is the opinion of this Court that the intent of paragraph 5 was not to protect the Railroads against the negligence of its own employees, but rather against Third-party actions or the negligence of Union Camp through its employees or agents.

For these reasons the Court is of the opinion that it must follow the weight of authority which requires the conclusion that the Railroads are not entitled to recover from Union Camp for the judgment rendered against them in the main case.

IT IS, THEREFORE, CONSIDERED, ORDERED, AND ADJUDGED that the Motion for Summary Judgment of defendant Union Camp Paper Corporation is

granted and the cross-claim of Seaboard Coastline Railroad Company and Central of Georgia Railroad Company and Central of Georgia Railroad Company is dismissed.

ORDERED FURTHER, that the Summary Judgment Motion of Seaboard Coastline Railroad Company and Central of Georgia Railway Company is denied.

In Open Court this 21st day of June, 1977.

/s/ [illegible]

Judge Superior Court, E. J. C., Georgia

Minute Book 330 Folio 82

Supreme Court, U. S.
FILED
NOV 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-531

UNION CAMP CORPORATION, *Petitioner*

v.

SEABOARD COAST LINE RAILROAD COMPANY, RAY D. BROWN AND NANCY JANE BROWN, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT SEABOARD COAST LINE RAILROAD COMPANY IN OPPOSITION

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v.

SEABOARD COAST LINE RAILROAD COMPANY, RAY D. BROWN AND NANCY JANE BROWN, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT SEABOARD COAST LINE RAILROAD COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the United State Court of Appeals for the Fifth Circuit is reported at 554 F.2d 1299 and is reproduced in Petitioner's Appendix (Pet. App. 2a-18a). The August 6, 1975, Order and opinion of the United States District Court for the Southern District of Georgia and the September 10, 1975, Order and opinion of the District Court are unreported and omitted from Petitioner's Appendix. The District Court Orders and opinions appear as an Appendix to this brief (Resp. App. 1a-8a).

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 1a) was entered June 27, 1977. A Petition for Rehearing *en banc* was denied (Pet. App. 19a) on August 25, 1977. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals fail to follow the law of Georgia in its affirmance of the trial court that the contract in litigation provides indemnity to Respondent Seaboard Coast Line Railroad Company?

2. Is the decision below one which requires or justifies exercise by this Court of its discretionary review powers?

STATUTE INVOLVED

Georgia Code Section

> 20-702 (4266) Intention of parties must be sought—The cardinal rule of construction is to ascertain the intention of the parties. If that intention be clear, and it contravenes no rule of law, and sufficient words be used to arrive at the intention, it shall be enforced, irrespective of all technical or arbitrary rules of construction.

STATEMENT OF THE CASE

Petitioner Union Camp Corporation [Union Camp] seeks review of a Court of Appeals decision which affirms the District Court holding that Respondent Seaboard Coast Line Railroad Company [SCL] is entitled to full contractual indemnity for costs and expenses incurred in successfully defending the main action brought by Respondents Ray and Nancy Brown.

Union Camp and SCL were each found to be contributorily negligent with respect to a collision between a tractor-trailer driven by Brown and an SCL locomotive at a private crossing owned and maintained by Union Camp. The jury found that the negligence of the plaintiff exceeded that of either defendant and thus, under Georgia Law, the resulting judgment discharged both SCL and Union Camp. The Browns have not appeared in subsequent proceedings.

By agreement, SCL's cross-claim for contractual indemnity was tried by the Court after return of the jury in the main case. The cross claim is founded on paragraph 5 (providing indemnity for crossing accidents)[1] and paragraph 12 (providing indemnity where Union Camp caused or contributed to any accident on its property)[2] of a road switching agreement which fixes the rights and liabilities of Union Camp and several rail-

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[1] Paragraph five provides in pertinent part:

> . . . Union Camp, at all times, to protect, hold harmless and indemnify [SCL] . . . against any and all loss, cost, damage and expense accruing account of any road crossing at grade with tracks of Union Camp.

(Pet. App. 23a).

[2] The undertaking in paragraph twelve of the Joint Switching Agreement states in pertinent part:

> In the operation, use . . . or maintenance of the tracks . . . Union Camp hereby assumes all risk of, and liability for, loss or damage to any property or injury or death to any person, caused directly or indirectly, *or contributed to*, by the acts. defaults or negligence of Union Camp. . . . Union Camp will further indemnify and save harmless [SCL] . . . from all loss, damage and expense growing in any manner out of such acts, defaults, or negligence of Union Camp . . . or in any manner growing out of defects in trackage owned and maintained by Union Camp.

(Pet. App. 26a, 27a) (emphasis added).

roads (one of which is SCL) in connection with railroad operations at a Union Camp plant near Savannah, Georgia. The contract appears in its entirety as Petitioner's Appendix C (Pet. App. 20a-29a).

In its Order and opinion of August 6, 1975 (Resp. App. 1a) the District Court held that SCL was entitled to judgment on its cross-claim for all expenses, including attorneys fees, incurred in defense of the main action. Upon motion of Union Camp, the Court reconsidered its conclusion but reaffirmed its finding

> . . . that the *all inclusive* language of the contract in this case "can leave no doubt that it was the intention of the parties" that SCL was to be indemnified by Union Camp in the situation presented here, where the joint negligence of Union Camp and SCL caused the damage and expense sought to be indemnified.

Order and opinion of September 10, 1975, (Resp. App. 7a) (emphasis in original) *quoting Robert & Company Associates* v. *Pinkerton & Laws Company,* 120 Ga. App. 29, 31, 169 S.E.2d 360 (1969).

Union Camp appealed to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291. The Fifth Circuit examined the contractual language at issue in light of the circumstances of the parties and the overall purpose of the agreement. That court concluded that "the intent of the parties arising from the entirety of the contract is that Seaboard should be held harmless for its own negligence", 554 F.2d at 1303 (Pet. App. 15a-16a), affirming the District Court.

Union Camp filed a timely Petition for Rehearing *En Banc* based in part upon the decision of the Superior Court of Chatham County, Georgia, in *Sammons* v. *Union Camp* (Pet. App. D, 30a-34a) which held that the indemnification for road crossing accidents contained in paragraph 5 of the contract is not invoked when, as in *Sammons,* Union Camp was adjudged not to be negligent in any degree.

The Fifth Circuit denied Union Camp's Petition for Rehearing *En Banc.*

REASONS FOR DENIAL OF WRIT

The District Court (Resp. App. 1a-8a) and the unanimous Court of Appeals (Pet. App. 2a-18a) held that the indemnity provisions at issue satisfy the "plain, clear and unequivocal" standard required by Georgia law to provide indemnity for the negligence of the indemnitee. Union Camp's petition for rehearing *en banc* in which it advanced the arguments now presented to this Court was denied (Pet. App. 19a). These decisions are correct and further review by this Court is unnecessary.

1. The Decision Below Correctly Applies Georgia Law To The Contract Between The Parties.

As Union Camp acknowledges, "[t]he ultimate question in this case is whether the contract reflects that the contracting parties must have contemplated and specifically provided for indemnification of the indemnitee's own negligence." (Pet. pp. 11, 12). The District Court and the Fifth Circuit correctly applied Georgia law to this contract and answered the question in the affirmative.

The District Court examined the contract as a whole in light of the circumstances of the parties. The Court applied Georgia law with particular emphasis on the

statutory mandate that "[t]he cardinal rule of construction is to ascertain the intention of the parties. If that intention be clear, and it contravenes no rule of law, and sufficient words be used to arrive at the intention, it shall be enforced, irrespective of all technical or arbitrary rules of construction." Ga. Code § 20-702 [Order and opinion of August 6, 1975 (Resp. App. 3a, 4a)]. The District Court concluded that SCL was entitled to contractual indemnity for its own negligence because "the intention is clear and no other rational meaning can be ascribed to the language used" (Resp. App. 4a). In ruling on Union Camp's motion for reconsideration, the Court reaffirmed its "holding that the language in the case at bar clearly and unequivocably expresses an intention to indemnify." Order and opinion of September 10, 1975 at 4 (Resp. App. 8a).

The Fifth Circuit decision enunciates the Georgia standard for determining whether an indemnitee will be held harmless for loss arising from its own negligence. An intent to so indemnify must be expressed in "plain, clear and unequivocal terms." No talismanic or "magic" words are required, however, and thus the determination must be made by close judicial examination of the particular contractual language at issue in light of the circumstances of the parties and the overall purpose of the agreement. 554 F.2d at 1302 (Pet. App. 10a, 11a).

The Circuit Court then applied the Georgia standard to the contractual language of this case, and concluded that the "plain, clear and unequivocal" standard to provide indemnity was met because of three factors. First, under paragraph 12, SCL is to be indemnified for losses arising out of "use . . . of the tracks". Because SCL was contractually permitted to use the tracks, indemnificatory coverage of that activity constituted "'a compelling indication that SCL is protected against its own negligence." The Court discussed *Louisville & Nashville R. R. Co.* v. *Atlantic Co.*, 66 Ga. App. 791, 19 S.E.2d 364 (1942), which is directly in point on this issue. 554 F.2d at 1303, (Pet. App. 13a-15a).

A second reason given by the Fifth Circuit for concluding that SCL was to be protected for its own negligence was the assumption by Union Camp of all "loss . . . contributed to . . . by the negligence of Union Camp"[3] and agreement to fully indemnify SCL under such circumstances. The Circuit Court held that the obligation of indemnity undertaken by Union Camp extended beyond its own negligence and encompassed the negligence of one "who was a tortfeasor in connection with Union Camp". 554 F.2d at 1303, (Pet. App. 15a).

The third factor in favor of indemnity coverage to SCL stressed by the Fifth Circuit was paragraph 5 which provides indemnity when a loss occurs by reason of a railroad crossing accident. That the railroad is a party likely to be found to be at fault in such an accident is a fact which the Fifth Circuit viewed as buttressing its conclusion that "the intention of the parties arising from the entirety of the contract is that Seaboard should be held harmless for its own negligence." 554 F.2d at 1303, 1304, (Pet. App. at 15a, 16a).

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[3] Petitioner's comparison of language discussion of the *Louisville & Nashville* case fails to mention Petitioner's agreement to hold harmless and indemnify where its negligence "contributed to" a loss; indeed the key words "contributed to" in paragraph 12 of the agreement are nowhere mentioned in Union Camp's Petition.

2. The Decision Below Is Unaffected by *Sammons* v. *Union Camp*.

Petitioner Union Camp urges that there is a "conflict" between the opinion below and the decision of a State trial court having county-wide jurisdiction in *Sammons* v. *Union Camp* (reproduced as Pet. App. D, Pet. App. 30a-34a), presently on appeal to the Georgia Court of Appeals (Pet. p. 2), Docket Number 55036.

At issue in this proceeding and in *Sammons* are certain indemnity provisions of a spur track switching agreement governing rights and liabilities of Union Camp and several railroads (including SCL) in connection with railroad operations at Union Camp's Savannah plant. In this proceeding, as in *Sammons,* a road crossing accident is involved, thus invoking paragraph 5 of the agreement. The State trial court judge in *Sammons* concluded that paragraph 5 of the agreement did not indemnify the railroad where Union Camp had been adjudged not to be negligent. That federal courts are not bound by such a decision is the holding of this Court in *King* v. *United Commercial Travelers,* 333 U. S. 153 (1948), and is acknowledged by Union Camp at page 7 of its Petition.

However, even if *Sammons* were to be affirmed by a Georgia appellate court, the judgment and decision of the Fifth Circuit in these proceedings would be unaffected. In this case, Union Camp was adjudged to be negligent. Thus Union Camp must indemnify SCL not only under paragraph 5 but also under paragraph 12 of the contract. Regardless of the ultimate disposition of *Sammons,* Union Camp is still fully liable to SCL under paragraph 12.

As the Superior Court stated in *Sammons*:

> In the case now before the court there is no question of joint negligence between the Railroads and Union Camp as the jury divided the negligence between the Railroads and the Plaintiff and specifically excluded Union Camp.

(Pet. App. at).

Therefore, this Court should deny Union Camp's "unusual request" (Pet. p. 4, n. 2) that this Court grant certiorari on Union Camp's slim hope that there may be somewhat of a conflict sometime in the future. Any conflict will not be material to the decision in this case.

3. Georgia Law Does Not Require Reference To "Indemnitee's Negligence".

Although Union Camp lists a number of Georgia cases and cases decided under Georgia law in which indemnity was denied, no Georgia case stands for the proposition which Union Camp attempts to advance, to wit: That contractual language of indemnity must make "mention, explicitly or by necessary implication, of the indemnitee's negligence." (Pet. at p. 8). The Fifth Circuit, citing ample Georgia authority held this contention to be without merit. 554 F.2d at 1304 (Pet. App. A, pp. 16a-17a).

As was held in the cornerstone case of *Batson-Cook Company* v. *Georgia Marble Setting Company,* 112 Ga. App. 226, 144 S.E.2d 547 (1965):

> Although a number of Georgia cases in which the indemnity agreement has been construed to cover the indemnitee's negligence specifically used the term "negligence" in reference to the indemnitee,

> we do not find any Georgia cases which make the use of this or any other specific term a prerequisite to the indemnitee's recovery.

Id. at 232, 233. Unlike the law of some states, *see, e.g., Cole* v. *Chevron Chemical Company,* 447 F.2d 361, 368 (5th Cir. 1973) (La. Law), Georgia law requires no talismanic words to cover an indemnitee for his own negligence. *Georgia Ports Authority* v. *Central of Georgia Railway,* 135 Ga. App. 859, 862, 210 S.E.2d 467 (1975). Indeed, in *Robert and Company Associates* v. *Pinkerton and Laws Company,* 120 Ga. App. 29, 169 S.E.2d 360 (1969), the Georgia Court of Appeals noted that the term "negligence" was not included in the indemnification agreement, but that "[i]f the word negligence had been used, it might be open to question that it was limited to liability only for negligence." Id. at 32 (citations omitted).

4. The Grammatical Construction Offered By Union Camp Omits Material Terms of the Contract.

Union Camp argues that the construction of paragraph 12 accorded by the Court below is a "grammatical impossibility". At page 10 of its Petition, Union Camp sets forth what it describes as the "essential structure" of paragraph 12.

The language quoted by Union Camp does not reflect its undertaking to fully indemnify SCL whenever the acts, defaults or negligence of Union camp caused "*. . . or contributed to . . .*" injury, death, or property damage. The glaring omission of the words "or contributed to" renders irrelevant Union Camp's grammatical analysis of the contract. Thus in the actual language of the contract (as opposed to that quoted by Union Camp), Union Camp assumes all risk of damage

or injury occuring in the maintenance, use or operation of the tracks, etc. caused or contributed to by Union Camp. The jury found that Union Camp was contributorily negligent.

The import of the words "contributed to" is discussed in the Fifth Circuit opinion 554 F.2d at 1303 (Pet. App. 15a). Nowhere in its Petition does Union Camp discuss this contractual undertaking.

5. Recovery Over Against An Indemnitor Is Not At Issue.

At page 12 of its Petition, Union Camp states that under Georgia law, liability to another is required before an indemnitee may seek *recovery over* against an indemnitor.[4] However, that issue is not involved in these proceedings. SCL paid nothing to the Plaintiff Ray Brown and seeks to recover of Union Camp only its expenses incurred in the successful defense of Respondent Brown's claim. Under Georgia law, an indemnitee is entitled to recover costs of litigation and attorneys fees incurred in defending the main action. *U.S.A., Inc.* v. *Kirkland,* 142 Ga. App. 484, 233 S.E.2d 833 (May 9, 1977), *rehearing denied,* 142 Ga. App. 486, 233 S.E.2d 835 (June 1, 1977). No Georgia case holds that a successful defense defeats such recovery.

6. *United States* v. *Seckinger* Does Not Involve Georgia Law.

Reason "5" advanced by Union Camp at page 12 of its Petition is entitled "Said Interpretation Ignores

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[4] As noted by the Fifth Circuit, in the area of contractual indemnity, Georgia law does not require a judgment fixing liability as a "prerequisite to recovery on the contract." 554 F.2d at 1304 (Pet. App. 16a, 17a), *citing Robert & Co. Assc.* v. *Pinkerton and Laws Co.,* 120 Ga. App. 29, 33, 169 S.E.2d 360 (1969) and *Rite Diet Feeds* v. *Central of Georgia Railway,* 136 Ga. App. 14, 16, 220 S.E.2d 22, 24 (1975).

the Georgia Comparative Negligence Rule in *U. S.* v. *Seckinger.*" The statement is without basis.

In *United States* v. *Seckinger,* 397 U.S. 203 (1970), this Court states at page 209 that its holding is one of federal law. Georgia law was not at issue. In *Southern Railway* v. *Brunswick Pulp & Paper Co.,* 386 F. Supp. 96 (S. D. Ga. 1974), then Chief Judge Lawrence made an *Eric* guess that a Georgia court would apply pure comparative negligence where, as in that case, contractual indemnity was limited to loss *caused by the indemnitee.* There was no "or contributed to" language in *Southern Railway.* No Georgia decision has adopted that holding. The contractual language in *Seckinger* is similarly limited. Neither *Seckinger* nor *Brunswick Paper* is even tangentially related to this case.

7. The Relevant Provisions Were Construed In Context.

A cursory reading of the opinion of the Fifth Circuit (Pet. App. 2a-12a) and the opinions of the District Court (Resp. App. 1a-8a) shows that there is no merit in Union Camp's assertion that paragraph 5 and paragraph 12 were not read in context. The District Court held:

> . . . the court is of the opinion that the entire language of the contract clearly expresses an intention that SCL be indemnified by Union Camp for expenses and attorneys fees . . .

(Resp. App. 5a). Similarly, the Fifth Circuit held: "The intent of the parties arising from the *entirety of the contract* is that Seaboard should be held harmless from its own negligence." 554 F.2d at 1303, 1304, (Pet. App. 16a) (emphasis added).

8. The Decision Below Does Not Require Or Justify Exercise By This Court Of Its Discretionary Powers of Review.

As noted by the Fifth Circuit:

> This case poses the recurring question whether an indemnity agreement which makes no explicit reference to the indemnitee's negligence can nonetheless suffice to relieve the indemnitee of losses occasioned by its negligence.

554 F.2d at 1302 (Pet. App. 9a).

The issue is whether the language of *this* contract, when read in light of the circumstances of *these* parties reflects a "plain, clear and unequivocal" intent to indemnify the indemnitee against its own negligence. Different language, different circumstances or a different standard will require a separate determination. This issue is uniquely narrow and no amount of strained semantics can convert it into one warranting review by this Court on certiorari. Indeed the Fifth Circuit noted that in indemnity cases "a court must closely examine the language of a contract in each case . . ." 554 F.2d at 1302, (Pet. App. 11a).

As previously discussed in this brief, only one State decision, *Sammons* v. *Union Camp,* has construed this contract. That trial court decision does not constitute controlling State law and even if affirmed would not create a conflict with the decision of the Fifth Circuit in this case which would require reversal of the instant case.

The attack waged by Union Camp on peripheral matters similarly falls short of the "special and important" considerations of this Court's Rule 19. Union Camp seeks to distinguish the most analogous State

decision [5] by a grammatical analysis of language which omits material terms of the actual contract. Union Camp cites "established Georgia law" with respect to recovery of payments to the injured party, an issue not present in this case. Finally, Union Camp cites the "Georgia Comparative Negligence Rule" which has not been adopted by any Georgia Court and which applies to language of indemnity quite different than that which is involved in this case.

In summary, Union Camp has not shown that the decision below involves an important State question or that it is in conflict with applicable State law or any other reason that this Court should grant review.

[5] *Louisville & Nashville R. R. Co.* v. *The Atlantic Company*, 66 Ga. App. 791, 19 S.E.2d 364 (1942) which is discussed by the Fifth Circuit. 554 F.2d at 1303 (Pet. App. 14a-15a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November, 1977

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION No. 474-183

RAY D. BROWN and NANCY BROWN, *Plaintiffs*

vs.

SEABOARD COAST LINE RAILROAD and UNION CAMP CORPORATION, *Defendants*

Order

In this negligence diversity action, Ray and Nancy Brown sued Seaboard Coast Line Railroad Company [SCL] and Union Camp Corporation [Union Camp] for damages resulting from a collision between Brown's tractor-trailer and an SCL locomotive at a private crossing owned and maintained by Union Camp.

SCL cross-claimed against Union Camp for any amount SCL might be required to pay the Browns in damages as well as for expenses of the litigation, including attorneys fees. Both defendants agreed that the cross-claim would be tried by the court without a jury following the submission of the main tort claim to the jury; but with the benefit of all relevant evidence introduced in the main case.

The jury, in response to special questions submitted to it under Rule 49(a), Fed. R. Civ. P., answered that Brown was 45% negligent, SCL 40% negligent, and Union Camp 15% negligent in jointly causing the collision. This resulted in a judgment discharging both defendants of any liability to the Browns because under the applicable Georgia law, a plaintiff may not recover against any defendant whose negligence is less than plaintiff's. *Mishoe* v. *Davis*, 64 Ga. App. 700 (1941).

SCL claims indemnity from Union Camp for all its expenses and attorneys fees incurred in defense of the main action. This claim is founded upon a contract between Union Camp and its "Plant Switching Railroads," one of which is SCL. That contract provides in pertinent part:

> "5. When deemed necessary by the Plant Switching Railroads, Union Camp will, at its expense, install, maintain and operate such road crossing protection as may be specified and considered necessary by the Plant Switching Railroads at any road crossing at grade over tracks of Union Camp; or, in lieu thereof, protect same with crossing watchman; Union Camp, at all times, to protect, hold harmless and indemnify the Plant Switching Railroad and S&A, collectively and individually, against any and all loss, cost, damage and expense accruing account of [sic] any road crossing at grade with tracks of Union Camp."
>
> • • •
>
> "12. In the construction, operation, use, repair, alteration or maintenance of the tracks, or any tracks adjacent thereto or connected therewith, covered by this agreement, or of the right of way, or any building, structure, equipment or work of any nature connected in any manner therewith, Union Camp hereby assumes all risk of, and liability for, loss or damage to any property or injury or death to any person, caused directly or indirectly, or contributed to, by the acts, defaults, or negligence of Union Camp, or any agent, employee or representative in its service or under its control, or by defects in trackage owned and maintained by Union Camp. Union Camp will further indemnify and save harmless the Plant Switching Railroads and S&A, or each of them, from all loss, damage and expense growing in any manner out of such acts, defaults or negligence of Union Camp, its agents, employees or representatives in its service

> or under its control, or in any manner growing out of defects in trackage owned and maintained by Union Camp."

There is no dispute that the tracks and crossing were involved in the collision and were owned and maintained by Union Camp. In addition, the Court finds from the evidence that Union Camp, in fact, exercised control of the crossing. At various times, it installed and removed traffic control signs governing the crossing and its approaches.

There is no dispute that Union Camp declined SCL's invitation to undertake SCL's defense of the main case.

There is no dispute that SCL incurred $1,605.37 expenses plus $4,950.00 attorneys fees in defense of its main case.

Following the verdict of the jury, Union Camp moved to dismiss the cross-claim upon the ground that "[u]nder Georgia law, a party may not seek indemnity over against another party until the party seeking indemnity is found liable to the injured party." Motion of Union Camp Corporation to Dismiss Cross-claim.

In substance, Union Camp's arguments in support of its disclaimer of liability come to this:

1. Neither the contract nor the law permits indemnity against losses resulting from one's own negligence.

2. The jury's verdict absolved Seaboard Coast Line from liability, thus eliminating the basis for any indemnity.

As a defense to SCL's claim for reimbursement of its attorneys fees, Union Camp asserts that the two contractual provisions involved do not provide indemnity for attorneys fees, *eo nomine,* and that the words, "loss," "cost," "damage," and "expense" do not mean or include "attorneys fees."

In construing a contract, be it one of indemnity or otherwise, "[t]he cardinal rule of construction is to ascertain

the intention of the parties. If that intention be clear, and it contravenes no rule of law, and sufficient words be used to arrive at the intention, it shall be enforced, irrespective of all technical or arbitrary rules of construction." Ga. Code § 20-702. *Every other rule is subservient to this one. Bridges* v. *Home Guano Co.*, 33 Ga. App. 305, 309 (1924). (Emphasis supplied). "The fundamental rule, the rule which swallows up almost all others in construing a paper, is to give it that meaning which will best carry into effect the intent of the parties. This is the object of rules of interpretation, to discover the true intent of the parties, and in doing this we are to take the whole of [the instrument] together, and to consider this with the surrounding circumstances." *Shorter* v. *Methvin*, 52 Ga. 225 (1), 230.

The first question, then—can a party contract to indemnify itself from its own negligence—must be answered in the affirmative where, as here, the intention is clear and no other rational meaning can be ascribed to the language used. *Southern Railway Company* v. *Brunswick Pulp & Paper Co.*, 376 F. Supp. 96 (S.D. Ga. 1974); *Batson-Cook Co.* v. *Georgia Marble Setting Co.*, 112 Ga. App. 226 (1965).

The language in this case as contained in paragraph 12 of the contract:

> ". . . Union Camp will further indemnify and save harmless [SCL] . . . from all loss, damage and expense growing in any manner out of such acts, defaults or negligence of Union Camp . . . or in any manner growing out of defects in trackage owned and maintained by Union Camp,"

is as all inclusive of indemnity as words can make it. *See L & N Railroad Co.* v. *Atlantic Co.*, 66 Ga. App. 791 (1942).

Next, Union Camp's contention that there is nothing to indemnify in the absence of the imposition of liability, is similarly without merit. Paragraph 5 of the contract provides, in part: ". . . Union Camp, at all times, to protect,

hold harmless and indemnify . . . [SCL] . . . against any and all loss, cost, damage and expense accruing account of [sic] any road crossing at grade with tracks of Union Camp."

The collision in question, the resulting lawsuit and the expense incident to its defense unquestionably constitute "loss, cost, damage and expense accruing account of any road crossing at grade with the tracks of Union Camp." Whether or not the Browns prevailed in their suit is immaterial. *See B & B Electric Co.* v. *G. E. Bass & Co.*, 252 F.2d 698 (1958), *cert. denied* 357 U.S. 931, *and see Robert and Co. Associates* v. *Pinkerton & Laws Company*, 120 Ga. App. 29, 33 (1969); *Miller & Co.* v. *Louisville & Nashville Railroad Co.*, 328 F.2d 73, 78 (5th Cir. 1960); *A.C. Israel Commodity Co.* v. *American-W. African Lines Co.*, 397 F.2d 170 (3d Cir. 1968).

Union Camp's remaining contention that the term "expense" does not include attorneys fees is gainsaid by a definition of the term as contained in paragraph 9 of the contract where it is defined as "including attorneys fees." *Cf. B & B Electric Co.* v. *G. E. Bass & Co., supra.* Nothing to the contrary appears anywhere in the contract. Moreover, the Court is of the opinion that the entire language of the contract clearly expresses an intention that SCL be indemnified by Union Camp for expenses and attorneys fees such as have been incurred by SCL in this case.

Accordingly, it must follow that SCL is entitled to recover these amounts. The Clerk is directed to enter judgment for SCL in the amount of Six Thousand Five Hundred Fifty-five Dollars and Thirty-seven Cents ($6,555.37).

So Ordered, this 6th day of August, 1975.

/s/ ANTHONY A. ALAIMO
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

(Caption Omitted in Printing)

Order on Motion for Reconsideration of the Order of August 6, 1975

Union Camp Corporation has moved the Court for a rehearing and reconsideration of the Court's Order entered August 6th, in substance finding in favor of Seaboard Coast Line Railroad Company [SCL] on its claim for indemnity.

Union Camp takes issue with the Court's construction of the language involved in this case, contending that it is in the face of the Georgia rule of construction in indemnity contracts. Next, in oral argument, Union Camp contends that the case of *Southern Railway Company* v. *Brunswick Pulp and Paper Co.*, 376 F. Supp. 96 (1974), stands for a contrary result than that reached by the Court in this case.

In *Robert & Company Associates* v. *Pinkerton & Laws Co.*, 120 Ga. App. 29, 31 (1969), the court held:

> " 'The cardinal rule of construction is to ascertain the intention of the parties. If that intention be clear, and it contravenes no rule of law, and sufficient words be used to arrive at the intention, it shall be enforced, irrespective of all technical or arbitrary rules of construction.' *Code* § 20-702.
>
> "Under the all-inclusive language of the agreement Pinkerton [Union Camp] not only agreed to '*be responsible from the time of signing the contract, or from the time of the beginning of the first work, whichever shall be earlier, for all injury or damage of any kind resulting from this work, to persons or property*' but also agreed specifically to '*exonerate, indemnify and save harmless the county and Robert & Company Associates* [SCL] . . . (Italics in original). *We think the language of this agreement can leave no doubt that it was the intention of the parties that Pinkerton [Union Camp] should indemnify Robert & Company Associates [SCL]* irrespective of whether any claim arose by reason of the negligence of Robert & Company Associates [SCL], or for other reasons." (Emphasis supplied).

In the case at bar, the following language appears from paragraph five of the contract:

> ". . .; Union Camp, at all times, to protect, hold harmless and indemnify [SCL] against any and all loss, cost, damage and expense accruing out of any road crossing at grade with the tracks of Union Camp."

And in paragraph twelve of the contract, ". . . Union Camp hereby assumes all risk of, and liability for, loss or damage to any property or injury or death to any person, caused directly or indirectly, or contributed to, by the acts, defaults, or negligence of Union Camp . . . Union Camp will further indemnify and save harmless [SCL] from all loss, damage and expense growing in any manner out of such acts, defaults or negligence of Union Camp . . . ." There is no dispute that Union Camp was found to be fifteen percent (15%) negligent in the main case.

This Court finds, as did the Court of Appeals of Georgia, with respect to the contract in *Robert & Company Associates, supra,* that the *all-inclusive* language of the contract in this case "can leave no doubt that it was the intention of the parties" that SCL was to be indemnified by Union Camp in the situation presented here, where the joint negligence of Union Camp and SCL caused the damage and expense sought to be indemnified.

Turning to the case of *Southern Railway Company* v. *Brunswick Pulp & Paper Company,* 376 F. Supp. 96, 100 (1974), the agreement construed in that case provided that

the Railroad was entitled to be indemnified for all damage resulting from the negligence of Brunswick Pulp. That language is much more restrictive than the language in the case at bar. Chief Judge Lawrence quoted from 41 Am. Jur. 2d, *Indemnity* § 15:

> "[A] contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms, or unless no other meaning can be ascribed to it." 376 F. Supp. 100.

That is consistent with this Court's holding that the language in the case at bar clearly and unequivocally expresses an intention to indemnify.

In a brief just received by the Court, SCL has called attention to a recent decision of the Court of Appeals of Georgia, *Georgia Ports Authority* v. *Georgia Railway Co.*, No. 50709, Court of Appeals of Georgia, decided September 3, 1975. An examination of that opinion reveals that the facts of that case are singularly and strikingly similar to the facts of the case at bar, including status of the parties as well as the contractual language of indemnity. An additional similarity in that in both cases, the railroad undertook the switching operation on private property purely as a private undertaking, and not as one pursuant to its obligation as a common carrier. It is this Court's opinion that the holding in *Georgia Ports Authority* must be construed to be controlling in the case at bar.

Accordingly, the Court adheres to the ruling contained in its Order of August 6, 1975.

So Ordered, this 10th day of September, 1975.

/s/ ANTHONY A. ALAIMO
United States District Judge